In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1693

CLIFTON L. BRIGHAM AND JANE G. BRIGHAM, ET AL.

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

In our brief in opposition to the petition for a writ of certiorari, we pointed out that, for a reason not reached by the court below, petitioner's claim in this case has no merit. Petitioners in reply allege (Pet. Rep. Br. 1, 2, n. 1) that the argument advanced in our brief in opposition is foreclosed by a government concession in the court below. This supplemental memorandum is filed to answer that allegation.

Petitioners' suit for refund is barred by the ordinary statute of limitations for tax cases, Section 6511 of the Internal Revenue Code of 1954, 26 U.S.C. 6511, unless petitioners satisfy all the prerequisites of Sections 1311 and 1312 of the Code, which permit the reopening of otherwise closed tax years. As we showed in our opposition, Section 1312 permits such reopening only

where a determination by the Commissioner affects the basis of property involved in prior transactions or results in a double inclusion of an item of income or a double disallowance of a deduction or credit, and the Commissioner's determinations here had no such consequences.

Petitioners do not contend that they have in fact satisfied the requirements of Section 1312; they claim instead that the government conceded in the court below that the requirements of Section 1312 had been met. But the government made no such concession. It merely argued, for purposes of its motion for judgment on the pleadings, that, even "assum[ing] *arguendo* that [the] requirements [of Section 1312] have been met" (Gov. Br. at 7),[1] petitioners had in any event failed to satisfy the additional requirement under Section 1311 of showing that the Commissioner had maintained inconsistent positions with respect to the years in question.

The Court of Claims, without reaching the question under Section 1312, decided the case on the ground that the Commissioner had not maintained inconsistent positions. Nevertheless, the government's argument below did not foreclose its reliance—either in further proceedings, if any, before the Court of Claims, or in opposing certiorari—on petitioners' failure to meet the requirements of Section 1312.[2]

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[1] A copy of the government's brief in the Court of Claims has been lodged with the Clerk of this Court.

[2] Petitioners also contend (Pet. Rep. Br. 2) that our principal reliance on Section 1312 constitutes a tacit admission that the decision below conflicts with three cited cases. Of course, no such admission was intended; to the contrary, we believe those cases are distinguishable on their facts.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

DOJ-1973-09